86-614

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

CHARLES C. WELCH,

Petitioner,

—against—

CARSON PRODUCTIONS GROUP, LTD.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JAMES P. COSTELLO
Attorney for Petitioner
20 Vesey Street
New York, New York 10007
(212) 349-1167

Of Counsel:
PETER CAMPBELL BROWN

TO THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES
OF THE SUPREME COURT OF THE UNITED STATES:

THE QUESTIONS PRESENTED

The five enumerated questions set forth below are respectfully submitted within the context of the case history contained in the Statement of the Case set forth in page 2 of the petition:

1) WHETHER the Public Health Cigarette Smoking Act renders illegal and null and void agreements to reuse copyrighted cigarette commericals on public television after January 1, 1971, and

2) WHETHER the constitutional right of due process of law of petitioner under the 7th Amendment was violated by the ruling and order of the federal district court herein suppressing any mention at trial of the issue of illegality of the agreements for the re-use of cigarette commercials in which petitioner's picture appeared that were banned by the enactment of the Public Health Cigarette Smoking Act of 1969, and the exclusion by said court of all proffered evidence relating thereto in petitioner's suit against respondent in said court, and

3) WHETHER the Screen Actors Guild Inc, petitioner's labor union, could lawfully and constitutionally make any collective bargaining agreement with respondent, binding upon petitioner, consenting to the re-use on public television of cigarette commercials made by petitioner prior to the enactment of the Public Health Cigarette Smoking Act of 1969, and

4) WHETHER the constitutional right of due process of law of petitioner was further violated by the district court direction of a verdict against petitioner in favor of respondent based on such collective bargaining agreement of the Screen Actors Guild, the provisions of the Public Health Cigarette Smoking Act to the contrary notwithstanding, and,

5) WHETHER besides the violation of petitioner's individual constitutional rights, the important national public health interests expressed in the enactment of the Public Health Cigarette Smoking Act,* and the failure of the lower courts to apply such Act herein, warrants the issuance of certiorari and ultimate remand for a trial on the merits of the issue of illegality contained in the complaint and Joint Pre-Trial Order herein.

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*cf footnotes in Larus & Brother Company v F.C.C., 447 Fed 2d 876, 879; "Smoking and Cardio-vascular disease", lung, larnyx and oral cancer and pulmonary emphysema. Death purveying TV ads.

In the landmark, Captial Broadcasting v. Mitchell, 333 F Supp 582, involving the public interest in the Public Health Cigarette Smoking Act, there was judicially noted the "unique" and "pervasive" and "subliminial" impact of cigarette commercials "broadcast on the electronic media and their potential influence on young people, and ... that the younger the individual, the greater the reliance on the broadcast message rather than the written word".

In addition to Benson & Hedges television advertising respondent also used Marlboro, Lark, Philip Morris and Old Gold TV commercials; cf Pg. A-29 of Appendix.

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1986

CHARLES C. WELCH,

Petitioner,

-against-

CARSON PRODUCTIONS GROUP, LTD.,

Respondent,

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To The Chief Justice And The Associate Justices
Of The Supreme Court Of The United States:

The petitioner, CHARLES C. WELCH, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered herein on July 3, 1986.

OPINIONS BELOW

The opinion of the said circuit court panel, at 791 F.2d 13 (2nd CCA, 1986), is set forth in the Appendix, pages A-1 et seq, and the unreported opinion of the District Court of the Southern District of New York, (Shirley Wohl Kram,J) photocopied from the transcript of the record herein, is set forth in the Appendix, pages A-10 et seq.

JURISDICTION

The judgment of the panel of the Court of Appeals for the Second Circuit sought to be reviewed was entered July 3, 1986, and the jurisdiction of this Court is invoked under 28 U.S.C. Sec.1254 (1).

STATEMENT OF THE CASE

The five questions presented to the Court herein arise out of petitioner's claim for injunction and damages in the complaint [1] filed in the U.S. District Court for the Southern District of New York, predicated on the violation, on national television, [2] of petitioner's right of privacy under the Civil Rights Law of the State of New York [3] in that respondent non-consentually used petitioner's picture [4] as contained in a copyrighted commercial advertising Benson & Hedges cigarettes which petitioner had made in 1968, for the Philip Morris Company in the City of New York, through its ad agency prior to the enactment

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1. Cf photocopy of Complaint in Appendix, pg 15 et seq.

2. To an estimated audience of 17,400,000 TV families.

3. The Civil Rights Law of the State of New York, in pertinent part, reads as follows:

> "Section 50. Right of Privacy. A person, firm or corporation that uses for advertising purposes, or for the purposes of trade, the ... picture of any living person without having first obtained the written consent of such person ... is guilty of a misdemeanor", and then

the next section, 51, gives the aggrieved party a statutory "Action for Injunction and Damages", cf pg A-32 of Appendix.

4. A photocopy of said picture is annexed as an Exhibit to the complaint, cf page A-20 of the Appendix herein.

of the Public Health Cigarette Smoking Act,[5] which said use by respondent was for its own corporate purposes of trade, i.e. the making and leasing of filmed television programs for the commercial trade purposes of NBC Entertainment, a division of the National Broadcasting Company.

In its answer respondent disclaimed liability, claiming it had the right to use petitioner's picture in said cigarette-advertising commercial by an agreement which it obtained from petitioner's union, the Screen Actors Guild, Inc.

Petitioner took issue in the Joint Pre-Trial Order[6] with the alleged validity of such claim of

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5. The pertinent provisions of the Public Health Cigarette Smoking Act of 1969 are set forth in the following sections:

> "Section 1335. Unlawful Advertisements on Medium of Electronic Communication."
>
> "After January 1, 1971, it shall be unlawful to advertise cigarettes and little cigars on any medium of electronic communication subject to the jurisdiction of the Federal Communications Commission;", and,
>
> "Section 1338. Criminal Penalty.
>
> "Any person who violates the provisions of this chapter shall be guilty of a misdemeanor and shall on conviction thereof be subject to a fine of not more than $10,000.00."

6. Cf trial excerpt on Appendix pg A-21.

right on the ground that any agreement which purported to consent to the re-use of this banned cigarette-advertising commercial (including respondent's alleged "license" from the Philip Morris Company) was illegal and null and void and had no binding effect on petitioner by reason of such illegality, i.e. that perforce of Section 1335 of the Public Health Cigarette Smoking Act of 1969 it was unlawful to reuse cigarette-advertising commercials on TV after January 1, 1971.

Nonetheless, the district court,over an objection noted in the Record, made a trial ruling[7] that petitioner's counsel could make no mention during trial or in his opening to the jury regarding the illegality of the reuse of these cigarette-advertising commercials and subsequently followed up such rule of silence by suppressing and denying admissibility to petitioner's lay and profferred expert testimony in regard to illegality[8] and also suppressed the references to the Public

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7. Cf trial excerpt on Appendix pg A-26.

8. Cf trial excerpt on Appendix pg A-28.

Health Cigarette Smoking Act contained in the "license" respondent had from Philip Morris. [9]

After having thus stripped petitioner of the said affirmative defense of illegality the court on respondent's motion subsequently directed a verdict in respondent's favor and against petitioner dismissing his complaint, said court's oral decision [10] being based only on the alleged binding agreement made with Screen Actors Guild Inc consenting to the use and disregarding the existence or application of the Public Health Cigarette Smoking Act and the issue of illegality herein.

On appeal, the circuit court panel in its written opinion [11] also completely disregarded and did not refer to the said issue of illegality nor

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9. Cf photocopy of license of Philip Morris, Exhibit 16 for ID at trial; the part that was suppressed and excised by being covered-up with an overlay of opaque white ink before being admitted into evidence is here underlined and highlighted with transparent yellow ink for ready-recognition purposes.(cf Appendix A-23)

10. A photocopy from the stenographic Record of the oral decision rendered in the district court is contained in Appendix pgs A-10, et seq.

11. A photocopy of the slip opinion of the panel (Miner, CCJ) set forth in the Appendix, pgs A-1 , et seq.

the Public Health Cigarette Smoking Act, not even by way of footnote or otherwise, though petitioner's first and principal appeal point [12] was based on and highlighted such absolute affirmative defense of the illegality of TV cigarette-advertising commercials brought about by the enactment of the Public Health Cigarette Smoking Act in 1969.

Petitioner's ensuing request for a rehearing, with a suggestion for en banc consideration, based on the panel's failure to treat or recognize or decide such issue of illegality or the Public Health Cigarette Smoking Act, which issue had duly come on to be heard for appellate consideration and determination, was denied - again without any comment or recognition or mention of illegality or of the Public Health Cigarette Smoking Act.

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12. The petitioner's first point on appeal herein with respect to such illegality was as follows:

POINT I

"The licensing contract between the defendant and Philip Morris Inc to re-use the banned Benson & Hedges TV cigarette commercial was inherently and prima facie violative of the U.S. Public Health Cigarette Smoking Act and was therefore illegal and any consent alleged to have been made on behalf of plaintiff agreeing to such re-use (by the Screen Actors Guild or anyone else) was and is likewise illegal and null and void."

THE CONSTITUTIONAL PROVISION INVOLVED

The constitutional provision involved in this case is the Seventh Amendment to the Constitution of the United States which reads as follows:

> "AMENDMENT (VII): In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

THE NON-TRIAL OF THE ISSUE OF ILLEGALITY HEREIN

The non-trial of the issue of illegality that was set forth in the Joint Pre-Trial Order [13] and complaint herein was occasioned by the district court ruling and order made at the very outset of trial, silencing petitioner's counsel and suppressing any mention or reference by him regarding the issue of the illegality of TV cigarette commercials in his opening statement to the jury [14] and said court's further extending such suppression order

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13. Cf. extract from Record, A-21.

14. Cf. extract from Record, A-26.

and ruling to petitioner himself [15] during his direct testimony and, lastly, striking from petitioner's principal written Exhibit 16 (the "license" from the Philip Morris Company granted to respondent to re-use the Benson & Hedges cigarette commercial) all of the references to the Public Health Cigarette Smoking Act, the very legal basis of the unlawfulness of the re-use of cigarette advertisements on public television, [16] and then also denying to petitioner the right to show such illegality by the expert testimony of the acknowledged communications and advertising authority, Dr. Wilson Bryan Key. [17]

The foregoing rulings and orders of the trial court speak for themselves that, as to petitioner's affirmative defense of illegality, there was no trial whatsoever (not just merely an "unfair" trial) in the district court herein, inasmuch as said issue of illegality had been specifically set in

15. Cf. Excerpt from Record on pag A-30 of Appendix.

16. Cf. Philip Morris License, Appendix A-24.

17. Cf. abstract from record, Appendix A-28.

the Joint Pre-Trial Order which, by its very terms of agreement signed by the trial judge and both attorneys for the parties, was the agreed upon trial blue print, to wit,:

> "2. The parties are agreed that the trial of this action should be based upon this order and upon the pleadings as deemed amended."

Under this heading petitioner accordingly respectfully submits the record is crystal clear that these rulings were not mere evidentiary matters but,rather, related to issues of the substantive law of contracts, as will be shown below under the "law of the case",[18] and, because of the district court's said rulings,it cannot be said, in all truth and justice, that there was any trial had in the district court below on said issue of illegality.

Put simply, the issue of illegality that was duly raised by petitioner was not tried herein for the

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18. Cf Law of the case, etc., pg 15, infra.

reason that the district court rulings per se denied petitioner the constitutional right, from beginning to end, to mention or offer any proof with respect to that issue.

After these arbitrary suppression and prohibitory rulings were made no issue of illegality was left which could factually go to the jury.

The so-called "overwhelming" evidence in this case did not therefore apply to the defense of illegality regarding the Philip Morris and Screen Actors Guild agreements - a defense which is the absolute defense of nullity under the law of contracts.[19]

Petitioner most respectfully submits that the district court rulings "speak for themselves" and that as such they constituted and were and are a substantial denial of petitioner's constitutional right of due process of law and of trial herein on an important public issue of illegality regarding cigarette-advertising commercials under the Public

19. Cf Law of the case, etc., pg 15, infra.

Health Cigarette Smoking Act of 1969, effective January 1, 1971.

THE ELIMINATION AT TRIAL OF THE ISSUE OF ILLEGALITY

The ultimate act of elimination of the framed issue of illegality at trial took place when the licensing contract between Philip Morris and Carson Productions Ltd was offered by the petitioner, *in toto*, just as it had been prepared by Philip Morris and signed without change by the Executive Vice-President of the respondent:

> "Q - Now insofar as Disadvantages is concerned, you did that in accordance with an agreement with Philip Morris Company, didn't you? You got a license to use that from the Philip Morris Company, isn't that correct, Disadvantages?
>
> "A - I don't know if you would call it a license. We had their permission to use the commercial, yes.
>
> "Q - I show you plaintiff's Exhibit 16 for Identification and ask you if this is a copy of the license that you received from Philip Morris?
>
> THE COURT: Did you see that, Mr. Huff?

MR. HUFF: I am aware of it, your Honor. As soon as she answers affirmative or negative I would like to approach.

"A - Excuse me, sir, could you repeat the question?

THE COURT - Will the reporter read it back, please.

"A - Again, I don't know if you would call it a license, but this is the document that we received from Philip Morris giving us permission, permission to use their copywritten material.

MR HUFF: - May we approach for a second.

(At side bar)

MR HUFF: we respectfully request a redaction of the item which the court will see, I think, on the last page about the Cigarette Act. Otherwise we don't object. Paragraph three, I beg your pardon, Judge, it is on the second page.

THE COURT: Yes.

MR. COSTELLO: I object to the redaction.

THE COURT: The redaction is to be made.

MR. COSTELLO: Redaction denied?

THE COURT: No. It is permitted."

Thereupon the trial court acquiesced in the defendant's request to excise from its own agreement any responsibility "applicable to its use of

the Commercials pursuant hereto", thereby eliminating the issue of illegality and also anything about its "public interest" and how such "public interest" was "determined" by it. This unusual circumstance of redaction is shown by the following photographic reproduction of that paragraph (the redacted part is underlined and highlighted with transparent yellow ink for comparison's sake):

3. Producer shall be responsible for compliance with all laws, regulations and codes applicable to its use of the Commercials pursuant thereto. Producer acknowledges that it is cognizant of the Public Health Cigarette Act of 1969 and that Producer's decision to use the Commercials is a result of its determination that they are of public interest in connection with the Production. Philip Morris and Producer acknowledge and agree that neither Philip Morris nor its employees or agents have made or shall make any payment of any kind in connection with this matter. Producer shall be responsible for obtaining all necessary consents and releases (other than those included in the license hereunder with respect to music or other elements of the Commercials) and for paying all fees and other expenses (including without limitation any applicable fees for use of third-party music and/or talent) associated with Producer's use of the Commercials in the Production.

After redaction the document was received into evidence as Plaintiff's Exhibit 16, with an unredacted copy for identification that was marked

Plaintiff's Exhibit 16 ID (A-610). Thus Exhibit 16, with the highlighted excision of the Public Health Cigarette Smoking Act,was accepted into evidence in such emasculated form (see the entire 3-page license in the Appendix herein, pgs A- 23 et seq.).

This act of removing all mention of the Public Health Cigarette Smoking Act was a further extension of the initial rulings made before the openings that had suppressed any mention of illegality regarding the re-use of these cigarette-advertising commercials (see Appendix, page A- 26 , wherein petitioner's counsel was silenced regarding all reference to the illegality involved in the re-use of the Benson & Hedges Cigarette commercial).

The foregoing reflects, in part, the various exclusion and suppression orders made by the court, over petitioner's objections, with respect to the unauthorized elimination by the court of the framed issue of illegality that was contained in the Joint Pre-Trial Order that was to have been an integral part of petitioner's case against respondent at trial herein.

THE LAW OF THE CASE AND REASONS FOR GRANTING CERTIORARI HEREIN

This Court has a venerable history with respect to the immutable law of illegality of contract.

More than 100 years ago, in Oscanyan v. Arms, 103 U.S. 268, it was said in respect to the U. S. Supreme Court view of the law of illegality that,

> "Whenever the illegality appears, whether the evidence comes from one side or the other, the disclosure is fatal to the case."

On this court's criterion of the law of illegality the license in this case from Philip Morris to respondent is therefore fatally flawed.

This license in question is an agreement to put cigarette commercials on public television on NBC-TV network in an entertainment program of Carson Productions on Sunday evening, November 7, 1982 (cf photocopy of license, Appendix page A-23).

As such, this "license" from Philip Morris to Carson is in direct violation of Section 1335 of the Public Health Cigarette Smoking Act of 1969, and, within the Oscanyan case, it is "no contract"

- it's a nullity in fact - and "no consent can neutralize its effect".

Thus, in this case the license from Philip Morris to Carson is absolutely void and, correspondingly, no "consent" by Screen Actors Guild Inc, or anyone else for that matter, can make it lawful and binding on its membership, individually or collectively, including the petitioner personally.

Since the "license" of Philip Morris is governed by the substantive law of contracts of New York as to its illegality, the following, quoted from 21 New York Jurisprudence 2d, Section 147, at page 555, shows that New York law conforms to the Oscanyan case in this Court:

> "An agreement which violates a provision of ... a statute or which cannot be performed without violating such a provision is illegal and void.
>
> "Thus, a contract made in violation of a criminal or prohibitory statute is an unlawful undertaking, and is void and unenforceable."

Accordingly, the binding consent claimed by Carson

Productions through any agreement with Screen Actors Guild Inc is therefore "no consent" under the law of illegality of contract and, since Carson obtained no personal consent from the petitioner,[21] Mr. Welch's rights under Section 50 and 51 of the Civil Rights Law of the State of New York are wholly unaffected by what was attempted to be effectuated by Carson under either the license of Philip Morris or the agreement made with the Screen Actors Guild Inc.

Oscanyan, on page 268, stated that,

> "In such cases there can be no waiver. The defence is allowed, not for the sake of the defendant, but of the law itself.
>
> "Whenever the illegality appears, whether the evidence comes from one side or the other, the disclosure is fatal to the case.
>
> "No consent of the defendant can neutralize its effect. A stipulation in the most solemn form would be tainted with the vice of the original contract, and be void for the same reasons. Wherever the contamination reaches it destroys.
>
> "The principle to be extracted from all the cases is, that the law will not lend its support to a claim founded upon its violation."

21. Petitioner did not know or ever have any dealings with respondent in his entire career.

The same immutable principle of the law of illegality was expressed by the late great legal scholar Augustus Hand as follows:

> "... it is clear that a contract which violates the laws of the United States and contravenes the public policy as expressed in those laws is unenforceable (citing cases). This is so regardless of the equities as between the parties "...for the very meaning of public policy is the interest of others than the parties and that interest is not to be at the mercy of the defendant alone ... We are satisifed that the contract was so related to the performance of acts forbidden by law as to be itself illegal (cf Kaiser v Otis, 195 F2d 838, 843).

As to such adverse public interest and health considerations, petitioner's expert, Dr. Wilson Bryan Key, wrote in his book "Subliminal Seduction" about this particular Benson & Hedges commercial, when it was originally shown on television, as follows:

> "Though the cleverly designed ad is humorous the fact that many people are unable to disobey commands given or implied at a level of unawareness is not funny, not when you consider that this single ad is at least partially responsible for yearly statistics on cancer, emphysema and coronary disease."

This was written 15 years ago by Dr. Key and he was

prepared to repeat it on the stand in this district court trial if he had been permitted to do so by the lower court judge.

This, petitioner respectfully submits, is especially significant in light of the fact that some 17,400,000 TV families saw this cigarette-advertising commercial when Carson telecast it.

And also it is a fact that Carson used other Philip Morris brand cigarette commercials such as Marlboro, Lark, Johnny calling Philip Morris, etc, in his productions; truly a veritable cornucopia of advertising for that cigarette conglomerate (cf testimony of Carson internal producer Albrecht on Appendix page A- 29).

In the present posture of this case Carson still continues to go on inasmuch as the deterrent effect of petitioner's civil rights suit has, subject to this last effort, been eliminated.

Continuing on the public interest factor in this case, the testimony at the trial herein as to the effectiveness of this particular cigarette advertisement was boastfully given by the respon-

dent's co-hosts on this very prime-time showing when, from the prepared script, Mariette Hartley said to her co-host TV celebrity Ed McMahon:

> "As a result of that commercial (just shown to 17,400,000 families), Benson & Hedges, in just months, went from being a little-known cigarette to being the top-selling of all 100 millimeter cigarettes."
>
> To which accolade Mr. McMahon joined with smiling confirmation of that supposedly good advertising achievement, "That's right".

To the contrary however plaintiff respectfully submits that the important national public health interests are better served by keeping cigarette-advertising entirely off the public airways.

This is an established fact. The Surgeon General reports currently more than 350,000 cancer deaths annually are directly attributable to cigarette smoking (this does not include those cases resulting in emphysema and cardiovascular disease).

The cigarette industry, lead today by Philip Morris, is constantly interested, as is typified

by the instant case with Carson, in getting, one way or the other, television coverage which has been directly denied to them since 1971 by the Public Health Cigarette Smoking Act.

As an example, and one that this Court may quite properly take judicial notice of, it is a fact that during the baseball season a TV camera, carefully positioned on the first base side of Shea Stadium in New York, picks up the huge, stories-high billboard image of the ubiquitous, macho "Marlboro Man", who advertises that world's largest-selling cigarette (which is also owned by Philip Morris) through every inning - every time there is a play at first base - ground outs, pick-off plays, etc. Petitioner therefore now invites the judicial notice of this Court to the photo on Appendix Page A- 31 of such TV action and the Marlboro Man dominating the TV screen.

This clearly demonstrates subliminal advertising technique at its best and at its worst, (during a World Series this duplicitous device gets Marlboro world-wide advertising coverage by satell-

ite to literally hundreds of millions of viewers - all via the awesome electronics of television).

Truly therefore there is a substantial national public interest directly involved here, over and above, but accompanying, the substantial violation of petitioner's individual constitutional rights for which he is here seeking review, and of his own present national image on television as the Pepperidge Farm Man.

This national public health interest, added to the insidious violation of the Public Health Cigarette Smoking Act involved, warrants, petitioner most respectfully submits, this Court's issuance of certiorari to review herein and, ultimately, remand for trial on the merits of the issue of illegality of contract and of the license and of the performance under such license herein.

Respectfully submitted,

JAMES P. COSTELLO
Attorney for Petitioner

Of Counsel,
PETER CAMPBELL BROWN

APPENDIX

OPINION IN CIRCUIT COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 643—August Term, 1985

(Argued January 31, 1986 Decided May 16, 1986)

Docket No. 85-7774

CHARLES C. WELCH,

Plaintiff-Appellant,

—against—

CARSON PRODUCTIONS GROUP, LTD.,

Defendant-Appellee.

Before:

OAKES, WINTER and MINER,

Circuit Judges.

Appeal from a judgment of the United States District Court for the Southern District of New York (Kram, J.) directing a verdict for defendant on plaintiff's claims under sections 50 and 51 of the New York Civil Rights

Law relating to defendant's rebroadcast of two commercials in which plaintiff performed. The district court concluded that plaintiff was bound by the terms of his union's collective bargaining agreement, which allowed for the rebroadcast without his specific written consent.

Affirmed.

PETER CAMPBELL BROWN, New York, NY, (James P. Costello, New York, NY, of counsel), *for Plaintiff-Appellant.*

STEPHEN F. HUFF, New York, NY (Andres J. Valdespino, Pryor, Cashman, Sherman & Flynn, New York, NY, of counsel), *for Defendant-Appellee.*

MINER, *Circuit Judge*:

Charles Welch appeals from a judgment of the United States District Court for the Southern District of New York (Kram, J.) directing a verdict, Fed. R. Civ. P. 50(a), in favor of appellee Carson Productions Group, Ltd. ("Carson") on claims arising from Carson's allegedly unauthorized national television broadcast of two television commercials in which Welch performed. Welch claimed that the use of these commercials without his express written consent violated sections 50 and 51 of the New York Civil Rights Law. N.Y. Civ. Rights Law §§ 50-51 (Mckinney 1976 & Supp. 1986). The district court

concluded that the collective bargaining agreement between the Screen Actors Guild ("SAG"), Welch's union, and various television producers, authorized Carson's use of the commercials.[1] For the reasons set forth below, we affirm.

I. BACKGROUND

Charles Welch is a professional actor, currently appearing as the "Pepperidge Farm Man" in television commercials advertising Pepperidge Farm baked goods. Throughout his career, Welch has appeared in over seventy commercials advertising a wide assortment of products and services. Pertinent to this litigation, he appeared in a 1967 commercial entitled "Disadvantages," advertising Benson & Hedges cigarettes, and in a 1972 commercial entitled "Tap Dancer," advertising United Airlines. His appearance in each commercial was fleeting, lasting only five seconds and one second, respectively.

In 1982, Carson began production of a television program entitled, "Television's Greatest Commercials—Part II," starring Ed McMahon and Mariette Hartley. The program was designed as a collection of well-known commercials shown on television over the past thirty years. "Disadvantages" and "Tap Dancer" were among the commercials to be used in the program.

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1 Subsequent to the district court's decision, Welch commenced an action in New York State Supreme Court against Philip Morris, Inc., the original producer of one of the commercials at issue, alleging similar violations of the New York Civil Rights Law. The state court granted summary judgment to the defendant on collateral estoppel grounds, holding that the issues before it had been fully litigated in the federal action. *Welch v. Philip Morris, Inc.*, N.Y.L.J., March 20, 1986, at 7, col. 1 (Sup. Ct. N.Y. County March 19, 1986).

As part of the preparation for the reuse of the commercials, Carson contacted SAG in order to determine the manner in which those actors who had appeared in the selected commercials should be compensated for the reuse of the footage. SAG advised Carson that it would have to comply with the terms of the 1977 Screen Actors Guild Television Agreement ("Green Book"). Section 36 of that agreement, entitled "Reuse of Photography or Sound Track," provides that a producer may not reuse television film of an actor in a manner other than that for which the actor originally was employed "without separately bargaining with the player and reaching an agreement regarding such use. . . ." Green Book § 36(a). The agreement further sets forth the day-player rate to be paid to the actor for the reuse, *id.*, and provides that "[i]f the Producer is unable to find the player, it shall notify the Guild [SAG], and if the Guild is unable to find the player within a reasonable time, the Producer may use the photography . . . without penalty . . . ," *id.* § 36(b).

Consistent with the requirements of section 36, Carson attempted to identify those actors and actresses who had performed in the commercials it intended to use. This search proved unsuccessful in a number of cases, including the identification of Welch in "Disadvantages" and "Tap Dancer." Carson then informed SAG of its inability to identify Welch and forwarded to SAG video copies of the commercials. Upon SAG's request, Carson provided SAG with letters from the producers of the original commercials, corroborating Carson's inability to identify the individual. Shortly thereafter, SAG informed Carson that it too was unable to identify Welch from the commercials. In accordance with section 36(b) of the Green Book, therefore, Carson included the two commercials in its November 7, 1982 program broadcast.

Welch, who had been in Europe at the time of the broadcast, learned of the commercials' use several days later. He contacted SAG which, in turn, notified Carson of Welch's identity and requested that Carson "process [its] usual payment" to Welch. On December 14, 1982, Carson forwarded to Welch a letter informing him that he had appeared on the program and requesting that he sign an attached consent form authorizing the use of the film and entitling him to the $596 minimum Green Book payment. Welch's business manager notified Carson by letter that its payment was inadequate and warned that Carson's use of the footage without Welch's express authorization subjected Carson to possible legal liability.

When no agreement was reached with Carson, Welch commenced this action against Carson for compensatory and punitive damages, alleging that the use of the commercials without his written consent violated sections 50 and 51 of the New York Civil Rights Law, which proscribe the use of a person's "name, portrait or picture . . . for advertising purposes or for the purpose of trade without the written consent" of the individual. N.Y. Civ. Rights Law § 51 (Mckinney Supp. 1986).[2] A jury trial was commenced on August 26, 1985. Upon conclusion of the proof, the district court granted Carson's motion for a directed verdict, Fed. R. Civ. P. 50(a), on the ground that Welch had consented to the reuse of the commercials through his membership in SAG and that Carson had fulfilled the requirements of that union's collective bargaining provisions governing reuse photography. In addition, the district court concluded that Welch's remedy, if

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2 Once notified of Welch's dissatisfaction with its use of the footage, Carson voluntarily removed Welch's footage from the program prior to any rerun broadcasts.

any, was limited to the provisions of section 36(c) of the Green Book, which provides that where a single actor and a producer are unable to agree on compensation for the reuse of film, the "Producer may submit the matter to the Guild's [SAG's] Board of Directors for determination and both Producer and player shall be bound by the determination so made. . . ." Green Book § 36(c).

On appeal, Welch contends that, despite the provisions of the Green Book, section 51 requires the express written authorization of the *individual*, which Carson never obtained. He further argues that the Green Book did not serve to grant Carson the necessary consent, since that agreement applies only when there is an express contract between the actor and the producer who wishes to reuse the film. Consequently, Welch asserts that the issue of consent should have been submitted to the jury.

II. DISCUSSION

In determining whether the district court properly directed a verdict, we employ the same standard of review as applied by the district court in its initial review of Carson's motion. *C-Suzanne Beauty Salon, Ltd. v. General Insurance Company of America*, 574 F.2d 106, 112 n.10 (2d Cir. 1978). That review requires affirmance of the verdict if "there is such an overwhelming amount of evidence in favor of the movant that [a] reasonable and fair minded [jury] could not arrive at a verdict against him." *Mattivi v. South African Marine Corp., "Huguenot"*, 618 F.2d 163, 168 (2d Cir. 1980). Because we agree with the district court that a reasonable and fair minded jury could not have concluded that the collective

bargaining agreement binding Welch did not supply the necessary consent to reuse the commercials, we affirm.[3]

When an individual joins a labor union, he agrees, as a matter of law, to abide by that union's constitution and by-laws "unless [the provisions] are contrary to good morals or public policy or otherwise illegal." *In re Willard Alexander, Inc.*, 31 N.Y.2d 270, 273, 338 N.Y.S.2d 609, 611 (1972). Here, SAG's own membership application, which Welch signed when he joined the union in 1953, provides that the member will "abide and be bound by the . . . by-laws, rules and regulations of [SAG], as the same now are or may hereafter be amended, enlarged or diminished." The SAG Constitution and By-Laws further provides that each member is "bound by the provisions of all collective bargaining contracts in effect between [SAG] and motion picture producers as the same are or may hereafter be amended." SAG Const. art. XIV, § 6. Accordingly, it is indisputable that Welch, having freely joined SAG, now is bound by the collective bargaining agreements which SAG negotiated on behalf of its members.

The Green Book is one such collective bargaining agreement. Among other things, section 36 of that agreement establishes a comprehensive procedure for the identification and compensation of players where producers wish to reuse old footage of such players in new ventures. *For the protection of SAG members*, section 36 requires a producer to make a good faith effort to identify a film's players prior to its reuse. Green Book § 36(a), (b). If the

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3 In light of this holding, we need not reach the district court's other basis for the directed verdict, namely, the remedies existing under § 36(c) of the Green Book.

player is identified, the producer must negotiate with the player for the reuse of the film. *Id.* § 36(a). The player's footage then may be used only if an agreement is reached. *Id.* If, however, after a good faith effort the producer is unable to identify that player, he must inform SAG, which in turn conducts its own investigation. *Id.* § 36(b). If SAG's investigation also is unsuccessful in identifying the player, the producer may use the footage without penalty. *Id.* Testimony at trial by SAG's business agent, Kat Krone, conclusively established section 36's application to a situation like the one here, where a producer, not associated with the original filming of the commercial and with no contractual association with the players in that commercial, attempts to reuse the commercial in a different format.[4]

Here, Carson properly complied with section 36 by attempting to identify Welch and by contacting SAG when it was unable to do so. Only after SAG itself also was unable to identify Welch did Carson use the footage. Given Carson's strict adherence to the Green Book procedures and Welch's covenant as a member of SAG to abide by the agreement's provisions, it is clear that Welch must be viewed as having consented to the reuse of the commercials. As a member of SAG, Welch necessarily agreed to waive his statutory protection under section 51 in cases

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4 Welch contends that the Green Book did not control this broadcast. Rather, he asserts, the broadcast came within the ambit of SAG's 1982 Commercials Contract ("Red Book"). Even if Welch is correct, which is unlikely in light of the testimony of SAG's business manager, it makes little difference. Section 17B of the Red Book provides that "[i]f Producer is unable to find the principal performer within a reasonable time, it shall notify the Union, and if the Union is unable to find the principal performer within a reasonable time, Producer may reuse the photography or sound track without penalty." Red Book § 17B. Consequently, the same result would be reached regardless of which collective bargaining agreement governs.

of reuse photography in exchange for the protection of section 36 of the Green Book. It is well settled under New York law that statutory benefits or protections otherwise available to individuals may be waived by union members under collective bargaining agreements where alternative protective measures, which do not conflict with the legislative purpose of the statute at issue, are agreed upon in negotiations. *American Broadcasting Companies, Inc. v. Roberts*, 61 N.Y.2d 244, 247, 473 N.Y.S.2d 370, 371 (1984). The purpose behind section 51 simply is to prevent the commercial exploitation of an individual without his consent. *Rand v. Hearst Corporation*, 31 A.D.2d 406, 408, 298 N.Y.S.2d 405, 409 (1st Dep't 1969). The provisions of section 36 are entirely consistent with this underlying legislative intent, since the very purpose of the collective bargaining provision is to assure the player the opportunity to approve or disapprove the reuse and further to assure him appropriate compensation for such reuse.

III. CONCLUSION

Having found that the collective bargaining agreement by which Welch was bound supplied the necessary consent for Carson's reuse of the footage, the district court correctly directed a verdict in Carson's favor. We carefully have reviewed all of Welch's other contentions and find them to be without merit. Accordingly, the judgment of the district court is affirmed.

ORAL DECISION IN DISTRICT COURT:

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

CHARLES C. WELCH,

Plaintiff,

-against-

CARSON PRODUCTIONS GROUP, LTD.,

Defendant,

----------X

August 30th, 1985
10:20 a.m.

ORAL DECISION OF THE COURT

THE COURT: All right. The defendant has moved for a directed verdict pursuant to Rule 51 of the affirmative defense and on the plaintiff's claim. I will address the affirmative defense first.

Defendant has contended from the outset of this lawsuit that the appropriate way to resolve Mr. Welch's claim is pursuant to Section 36 C of Plaintiff's Exhibit 3.

Now that the evidence has been heard, it is uncontroverted based on Plaintiff's Exhibits 1 and

3 and the testimony of Miss Kat Krone, that the defendant's position is correct. It is uncontradicted even by Mr. Welch's testimony that Carson and Welch negotiated for the use in question here and failed to reach an agreement. It is equally uncontroverted that Mr. Welch was the only player from the United Airlines commercial, from the Benson & Hedges commercial and indeed from the entire program in question who could not agree on compensation.

Both Miss Krone and Miss Albrecht testified to this.

Thus, the defendants have proven by more than an uncontradicted preponderance of the evidence that this dispute is to be resolved by and Mr. Welch is bound by the first sentence of paragraph 36 C of Plaintiff's Exhibit 3.

Moreover, it is not disputed that the defendant has not used Mr. Welch's pictures since November of 1982.

Is that the correct date?

MR. HUFF: That is not the correct date. It has not reshown it and has taken it from the pro-

duction. It was shown a second time at a later date.

THE COURT: All right.

MR. HUFF: The show, Television's Greatest Commercials has been reaired once, and Mr. Welch's picture has been removed from it permanently.

THE COURT: Am I correct that you have represented in court and stipulated that you will not use his picture again?

MR. HUFF: That is correct.

THE COURT: Thus, there is no issue of injunctive relief because defendants have in effect consented to the entry of the injunctive relief Mr. Welch seeks.

This is also provided for pursuant to paragraph 36 of Plaintiff's Exhibit 3.

Thus, the jury could not reach any verdict other than the one which would compel Mr. Welch to resolve his claim pursuant to this paragraph, which is 36 C.

The evidence is clear, uncontroverted and there is no dispute as to any material fact. Defendant's motion for a directed verdict on this issue is granted.

Additionally, as to Mr. Welch's claim under Section 50 of the civil rights law, the evidence is equally uncontroverted and Mr. Welch has failed to make out a prima facie case.

That section requires that Mr. Welch's picture be used without his written consent. Plaintiff's Exhibits 1 and 3 and the uncontroverted testimony of Miss Krone prove that Mr. Welch agreed to be bound by Plaintiff's Exhibit 3.

Pursuant to paragraph 36 B of that exhibit, both defendant and the Screen Actors Guild attempted unsuccessfully to identify Mr. Welch prior to using his picture. Defendant properly notified the guild, and the guild, after unsuccessfully searching for Mr. Welch, gave consent to the defendant to use Mr. Welch's picture.

The evidence is clear and overwhelming on this point. The jury could not reach any conclusion other than the one which states that Mr. Welch gave his prior written consent to the defendants to use his picture. Thus, plaintiff has failed to and cannot possibly prove based on the evidence adduced at this

trial that his picture was used without his written consent. There is no factual dispute on this point.

Accordingly, defendant's motion for a directed verdict on this issue is also granted.

Judgment is to be entered in favor of the defendant and against the plaintiff, and that is so ordered.

MR. COSTELLO: I would like the record to show that we take exceptional exception to it.

THE COURT: Would you stand, sir.

MR. COSTELLO: Yes. We take exception to all of the comments that this was an uncontroverted proof by Miss Krone. He told this court, and he told this jury that he never agreed with anyone, so that she was contradicted, and he included specifically Screen Actors Guild.

THE COURT: Mr. Costello, you know, you have your remedy, and I am sure you will pursue it. If I am incorrect you certainly know what you can do about that.

Now I am going to thank you. I am going to call the jury in, and I am going to dismiss them.

MR. COSTELLO: And I thank you too, your honor.

THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

CHARLES C. WELCH, Plaintiff, -against- CARSON PRODUCTIONS GROUP, LTD., Defendant,	AMENDED COMPLAINT Jury Trial Demanded

Plaintiff, CHARLES C. WELCH, by his attorney, JAMES P. COSTELLO, complaining of the defendants individually and severally, alleges:

AS A FIRST CLAIM AGAINST THE DEFENDANT CARSON PRODUCTIONS GROUP, LTD., FOR THE UNAUTHORIZED USE OF PLAINTIFF'S PICTURE AND PORTRAIT IN VIOLATION OF SECTION 51 OF THE CIVIL RIGHTS LAW OF THE STATE OF NEW YORK:

1. That plaintiff is a citizen of the United States of America and a resident of the City, County and State of New York.

2. Upon information and belief that the defendant CARSON PRODUCTIONS GROUP, LTD., (hereinafter sometimes referred to as "CARSON") is a Delaware corporation authorized to do business in the State of California and maintains offices there at Studio City.

3. That this Court has jurisdiction herein under 28 USC Section 1332 in that there is diversity of citizenship between the parties and the amount in controversy, exclusive of interest and costs, exceeds the sum of $10,000.00.

4. That plaintiff is a long-time professional actor and for many years prior hereto he has been engaged in the theatrical industry and that in the pursuit of his said profession plaintiff has from time to time become engaged in the field of screened and taped productions known and described as "commercials", which said commercials are designed to be telecast in the electronics media to promote the sale and use of various products and services, and that in connection therewith plaintiff has generally agreed, under various limited conditions, with particular manufacturers and service organizations to perform profesionally in such commercials and consented that his picture and portrayal may thereafter be telecast for a period of time for such advertising purposes.

5. That in the course of his career and after a long period of testing, auditioning and interviewing covering over some three years' time, plaintiff was engaged by the Pepperidge Farm organization and

since the year 1977 to the present time he has become identified in the television media throughout the United States as the "Mr. Pepperidge Farm Man", which is a carefully-developed image of an old-fashioned grocer-type fellow who points out with homespun sincerity in New England style the fine qualities of their baked and other goods which are associated with the product integrity of that section of our country, said image of plaintiff as "Mr. Pepperidge Farm" being reflected, in part, in the photograph which is annexed hereto and marked "EXHIBIT A" and made a part hereof by this reference.

6. That plaintiff, years earlier in his career and prior to the federal ban on television advertising of cigarettes, undertook an engagement with Philip Morris Inc., through its agents and/or employees, to do a commercial designed to advertise a long-length cigarette manufactured by it and known as "Benson & Hedges 100's" in which said commercial plaintiff was portrayed in comic fashion as a sporty, girl-ogling, roué-type character smoking one of these distinctive long-length "Benson & Hedges 100's cigar-

ette as is reflected, in part, in the photograph which is annexed hereto and marked as "EXHIBIT B" and made a part hereof by this reference.

7. That the said federal ban against cigarette advertising on television, generally known as the Public Health Cigarette Smoking Act of 1969, became effective January 1, 1971 (after the plaintiff had made the aforedescribed "Benson & Hedges 100's" commercial), whereby it became, and still is, criminally unlawful to advertise cigarettes on television, said ban being set forth in Title 15 of the United States Code, Chapter 36, which in part reads as follows:

> "Section 1335. Unlawful advertisements on medium of electronic communications.
>
> "After January 1, 1971, it shall be unlawful to advertise cigarettes and little cigars on any medium of electronic communication subject to the jurisdiction of the Federal Communications Commission."

and the penal provision of that Chapter reads as follows:

> "Section 1338. Criminal Penalty.
>
> "Any person who violates the provisions of this chapter shall be guilty of a misdemeanor and shall on conviction thereof be subject to a fine of not more than $10,000.00."

8. Upon information and belief that the defendant CARSON has recently resurrected, in co-operation with Philip Morris Inc., by its agents and/or employees, the aforedescribed "Benson & Hedges 100's" long-length cigarette commercial in which the plaintiff, as aforesaid, is portrayed as a sporty, girl-ogling, cigarette-smoking, roue-type character, and has used such portrayal of the plaintiff, without plaintiff's consent, in a nation-wide telecast on prime time of a TV Special produced and licensed by CARSON entitled "Television's Great-est Commercials - Part II", which telecast included the State of New York.

9. That defendant CARSON's said use of plaintiff's picture and portrait was for the pur-poses of advertising or trade and its subsequent telecast in the State of New York was without the prior written consent of the plaintiff first obtain-ed and was and is in violation of the plaintiff's protected statutory rights as provided in Section 51 of the Civil Rights Law of the State of New York which reads, in pertinent part, as follows:

"Any person whose name, portrait or picture is used within this state for advertising purposes or for the purpose of trade without the written consent first obtained as above provided may maintain an equitable action in the supreme court of this state against the person, firm or corporation so using his name, portrait or picture, to prevent and restrain the use thereof; and may also sue and recover damages for any injuries sustained by reason of such use and if the defendant shall have knowingly used such person's name, portrait or picture in such manner as is forbidden or declared to be unlawful by the last section, the jury, in its discretion may award exemplary damages".

10. That the defendant CARSON knew that it did not have the written consent of the plaintiff prior to the use of his portrait and picture as aforesaid.

11. That the defendant CARSON is accordingly subject to the injunctive jurisdiction of this Court and to the award of compensatory and exemplary damages as provided in said Civil Rights Law.

PHOTOGRAPH OF PETITIONER AS THE PEPPERIDGE FARM MAN, EXHIBIT A

PHOTO OF PETITIONER PORTRAYED IN BENSON & HEDGES COMMERCIAL, EXHIBIT B

JOINT PRE-TRIAL ORDER EXCERPT CONTAINING AFFIRMATIVE DEFENSE OF ILLEGALITY

Cf Petition pg 3, footnote 6 Excerpt from Record

The Joint Pre-Trial Order sets forth the issue of illegality as affirmatively framed by the petitioner/plaintiff as follows:

"(1) That the Public Health Cigarette Smoking Act of 1969 has, since January 1, 1971, prohibiting under a criminal penalty the advertising of cigarette commercials on any medium of electronic communication subject to the jurisdiction of the Federal Communications Commission.

"As to the affirmative of that issue, the plaintiff respectfully invites the court's attention to the language of the statute in question, i.e. Title 15 of the United States Code, Chapter 36, which reads, in pertinent part, as follows:

"Section 1335. Unlawful Advertisements on Medium of Electronic Communication."

"After January 1, 1971, it shall be unlawful to advertise cigarettes and little cigars on any medium of electronic communication subject to the jurisdiction of the Federal Communications Commission;", and,

"Section 1338. Criminal Penalty.

"Any person who violates the provisions of this chapter shall be guilty of a misdemeanor and shall on conviction thereof be subject to a fine of not more than $10,000.00."

"(2) That perforce of said Public Health Cigarette Smoking Act of 1969 that any consent or licensing or contract that provides or arranges advertisements of cigarettes on any medium of electronic communication is illegal and void.

(Continued next Page)

"As to the affirmative of this issue the plaintiff submits the admissions of the representatives of the Philip Morris Company made during the pre-trial discovery proceedings.

"With respect to the Benson & Hedges TV commercial that is the subject of the first claim set forth in the complaint herein, since the licensor Philip Morris had no right to telecast that commercial plaintiff respectfully submits that it could confer no greater rights than it had to its licensee.

"Also plaintiff submits that any such agreement or consent is tainted and fraught with illegality of purpose."

The trial issue raised therefore is as follows:

"Would the use of the commercial known as 'Disadvantages' by Carson Productions serve to advertise Benson & Hedges cigarettes on a medium of electronic communication?"

and if the answer to that question is "yes" then plaintiff submits the licensing contract is violative of the U.S. Public Health Cigarette Smoking Act of 1969 and is unlawful, and, perforce thereof, null and void.

PHOTOCOPY OF 3-PAGE LICENSE FROM PHILIP MORRIS

(With Yellow Transparency Show Excision On Page 2 Of Issue Of Illegality And The Public Health Cigarette Smoking Act)

Cf Petition page 5, footnote 9, Exhibit 16

PHILIP MORRIS

U.S.A.

120 PARK AVENUE, NEW YORK, N.Y. 10017 TELEPHONE (212) 880-5000

November 2, 1982

VIA FEDERAL EXPRESS

Ms. Joie Albrecht and Mr. Scott Garen
The Carson Productions Group, Ltd.
9361 Olympic Boulevard
Beverly Hills, California 90212

Dear Ms. Albrecht and Mr. Garen:

This letter, when signed on behalf of Philip Morris U.S.A., a division of Philip Morris Incorporated ("Philip Morris"), and The Carson Productions Group, Ltd., a Delaware corporation ("Producer"), will constitute our agreement regarding Producer's request to use certain proprietary material of Philip Morris in a production for NBC-TV concerning television commercial advertising of the past forty years and tentatively entitled "Television's Greatest Commercials--Part II" (the "Production"). Producer and Philip Morris hereby agree as follows:

1. The material covered by this agreement includes the following commercial advertisements made for television (the "Commercials"):

PRODUCT	COMMERCIAL TITLE
BENSON & HEDGES	Disadvantages" (1967, 60 seconds)
PHILIP MORRIS	"Call for Philip Morris" segment from "I Love Luch" show theme

It is understood and agreed that the scope of the license granted to Producer hereunder includes musical compositions and recordings and other elements of the Commercials to the extent that such elements are owned by Philip Morris.

2. In consideration of the payment of one dollar to Philip Morris, receipt of which is hereby acknowledged, Philip Morris hereby grants to Producer the right to use and include all or part of the Commercials in the Production and to duplicate, distribute and exhibit the Commercials as used in the Production in any manner or media whatsoever, provided that the manner of use of the Commercials in the Production is subject to Philip Morris's prior approval, and provided further that Philip Morris shall use best efforts to give notice of its approval or disapproval to Producer in sufficient time to facilitate a projected initial broadcast of the Production on November 7, 1982. Subject to the foregoing, Producer shall have the right and discretion to determine the length of footage taken from the Commercials as well as the manner in which such footage shall be incorporated into the Production. Producer acknowledges that the rights conveyed hereunder with respect to the Commercials are nonexclusive.

3. Producer shall be responsible for compliance with all laws, regulations and codes applicable to its use of the Commercials pursuant hereto. Producer acknowledges that it is cognizant of the Public Health Cigarette Act of 1969 and that Producer's decision to use the Commercials is a result of its determination that they are of public interest in connection with the Production. Philip Morris and Producer acknowledge and agree that neither Philip Morris nor its employees or agents have made or shall make any payment of any kind in connection with this matter. Producer shall

be responsible for obtaining all necessary consents and releases (other than those included in the license hereunder with respect to music or other elements of the Commercials) and for paying all fees and other expenses (including without limitation any applicable fees for use of third-party music and/or talent) associated with Producer's use of the Commercials in the Production.

4. Producer acknowledges Philip Morris's ownership of the Commercials and Philip Morris acknowledges Producer's ownership of the Production, and neither Producer nor Philip Morris will at any time assert any rights in respect of the other party's proprietary material nor take any action which might impair such ownership interest or proprietary rights of the other party.

5. Producer shall indemnify and hold Philip Morris harmless from and against all liabilities, damages, losses and costs (including without limitation reasonable attorneys' fees and disbursements) arising out of claims by third parties in connection with Producer's use of the Commercials.

6. The rights hereby granted to Producer by Philip Morris are not limited in time or in number of permitted broadcasts, except that such rights shall automatically terminate (i) with respect to any of the Commercials that are not included in the Production as initially broadcast or (ii) on December 31, 1983, if the initial broadcast of the Production does not occur before such date. Nothing herein shall be deemed to obligate Producer to exercise any of the rights granted to Producer herein. Producer shall not assign or otherwise transfer any portion of its rights or obligations hereunder without the prior written consent of Philip Morris, provided that Producer may freely license exhibition and distribution rights in and to the Production itself without such consent. The rights and obligations of Philip Morris and Producer hereunder shall be binding upon their successors and permitted assigns.

If the foregoing meets with your approval, kindly so indicate by signing and returning the enclosed counterpart of this letter.

Very truly yours,

PHILIP MORRIS U.S.A.

By S/ FRANCES M. AMBROSINO
Frances M. Ambrosino
Manager, Product Publicity

ACCEPTED AND AGREED
as of the date of this letter:

THE CARSON PRODUCTION GROUP, LTD.

By S/ GERALD RUBIN

Title S/ EXECUTIVE VICE-PRESIDENT

RULING OF DISTRICT COURT SUPPRESSING MENTION OF ILLEGALITY OF TV CIGARETTE COMMERCIALS AT OPENING OF TRIAL:

Cf Petition pg 4, footnote 7, Excerpt from record

The following is set forth from the record with respect to the ruling and order prohibiting reference to illegality of TV commercials and silencing of petitioner's counsel:

"MR COSTELLO: How do we stand on that, am I lip-sealed?

"THE COURT: You heard my ruling.

"MR COSTELLO: Am I not to say anything at all about the Cigarette Smoking Act?

"THE COURT: I will consider it.

"MR COSTELLO: All right. Thank you. I will ask again, may I, before the opening?

"THE COURT: I will let you know."

and just before the openings were delivered the Record reflects the following:

"THE COURT: All right. We are about to start the opening, and I want to make sure there is no misunderstanding.

My ruling is that you are not to make any mention of any criminal sanctions, of any illegality or accuse the defendants of any illegal conduct, Mr. Costello.

"MR COSTELLO: May I reply to that, your Honor?

"THE COURT: No. That is my ruling.

"MR COSTELLO: Can I get a clarification?

"THE COURT: I mean exactly what I have said.

"MR. COSTELLO: Well if I don't comprehend it, how can I comply, your Honor?

"THE COURT: Well, that's the way it is, and if you make a statement which is contrary to that, I will sustain an objection.

"MR. COSTELLO: The only thing that I am trying to say is a reading of Section 50 of the Civil Rights Law --

"THE COURT: Mr. Costello, you have said all of that to me before. We are not going to continually reargue every point. I am indicating to you that is my ruling. You are not to make any reference to the illegality of this type of TV commercial, and you are not to accuse the defendants of illegal conduct.

This is a civil trial. They have not been convicted of any wrongdoing, and I don't want that kind of reference, period.

"MR COSTELLO: Yes, but I am bringing this action on a statutory tort, and I must comply with the requirements of that tort.

"THE COURT: You must comply with my ruling, Mr. Costello. That is my ruling.

Now please sit down.

"MR COSTELLO: I just take exception to it for the Record.

"THE COURT: Very well. The record indicates."

EXCERPT OF REJECTED TESTIMONY OF COMMUNICATION AND ADVERTISING EXPERT, DR. WILSON BRYAN KEY:

Cf Petition, Pg 4, footnote 8, Excerpt from Record

The offered, but rejected, testimony of the acknowledged advertising expert, Dr. Wilson Bryan Key, with respect to the advertising aspects of the use of the Benson & Hedges TV cigarette commercial by the respondent in its program and the public interest was, in part, as follows:

"Q - You as an advertising man, do you know whether or not that cigarette commercial was successful in selling more cigarettes for Benson & Hedges?

"A - It was indeed. It was very widely discussed at the time as one of the most successful campaign ideas that had ever been used.

"Q - Would you as an expert in advertising want to see that advertisement continued on the airwaves?

"A - No, indeed not. This type of advertising is now in violation of the federal statute.

"Q - Would you consider that a bad cigarette advertisement to be on the airwaves?

"A - Technically, it's an extraordinarily effective and well-done advertisement. In terms of social effects of the use of cigarettes and tobacco, it would be an enormously destructive thing to be using at this time, a view that has been upheld by the United States Congress, of course.

MR COSTELLO: That's all the questions I have."

TESTIMONY RE: MARLBORO, LARK AND PHILIP MORRIS COMMERCIALS USED BY RESPONDENT:

COPY OF TESTIMONY FROM CARSON INTERNAL PRODUCER J. ALBRECHT, TAKEN AT PRE-TRIAL PROCEEDINGS

Q Did you in any of your productions, I, II or III, use a Lark commercial?

A Yes.

Q Old Gold commercials?

A Yes.

Q Did you use the voice of Johnny, the call voice of Johnny in calling for Philip Morris?

A Yes.

Q Any others that you can recall?

A Any other what?

Q Any other cigarette commercials that you can recall.

A Yes.

Q Which ones?

A The classic Marlboro Man commercial.

Q How did you do that? Did you show him?

A Yes.

RULING OF DISTRICT COURT STRIKING MENTION OF BAN ON TV COMMERCIAL DURING DIRECT EXAMINATION OF PETITIONER

"Q - Now as I understand it, that commercial was an outstandingly successful commercial for the people in the cigarette business, is that correct?

"A - It absolutely was.

"Q - And it was responsible for the Benson & Hedges cigarettes to be sky-rocketed to No. 1 in that industry, was it not?

"A - Yes, it was really the biggest commercial to come along. In fact, it even made that director's reputation.

"Q - Now did there come a time when that commercial stopped running?

"A - Yes, sir.

"Q - Can you tell us why that was?

"A - I just know they were banned at a certain period.

THE COURT: The objection is sustained. That is to be stricken from the Record. That last part of the answer."

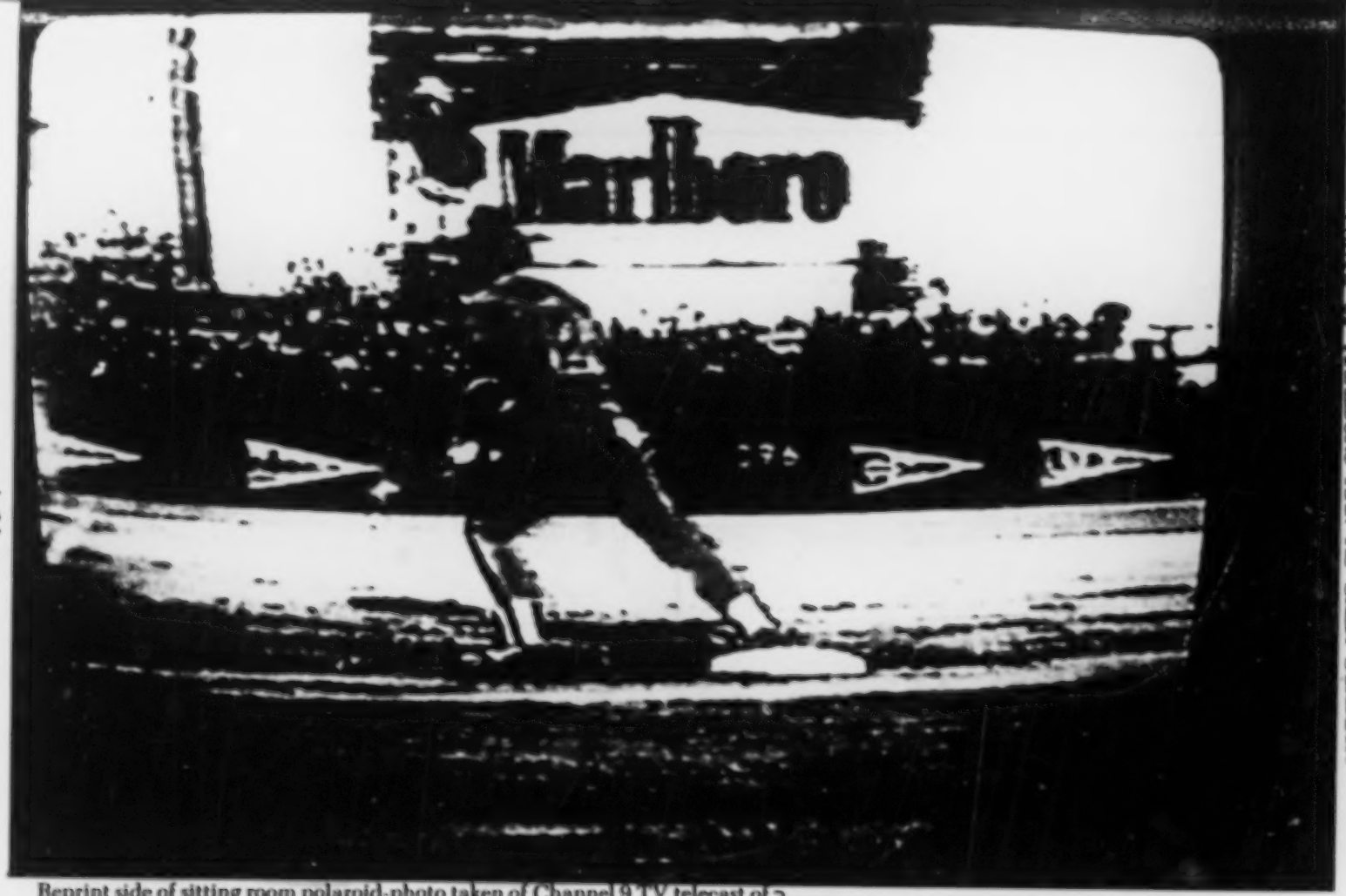

PHOTO OF MARLBORO MAN AT SHEA STADIUM

Reprint side of sitting room polaroid-photo taken of Channel 9 TV telecast of baseball game in progress showing picture dominance of cigarette-advertising Marlboro Man.

ARTICLE 5—RIGHT OF PRIVACY

§ 50. Right of privacy

A person, firm or corporation that uses for advertising purposes, or for the purposes of trade, the name, portrait or picture of any living person without having first obtained the written consent of such person, or if a minor of his or her parent or guardian, is guilty of a misdemeanor.

§ 51. Action for injunction and for damages

Any person whose name, portrait or picture is used within this state for advertising purposes or for the purposes of trade without the written consent first obtained as above provided may maintain an equitable action in the supreme court of this state against the person, firm or corporation so using his name, portrait or picture, to prevent and restrain the use thereof; and may also sue and recover damages for any injuries sustained by reason of such use and if the defendant shall have knowingly used such person's name, portrait or picture in such manner as is forbidden or declared to be unlawful by section fifty of this article, the jury, in its discretion, may award exemplary damages. But nothing contained in this article shall be so construed as to prevent any person, firm or corporation from selling or otherwise transferring any material containing such name, portrait or picture in whatever medium to any user of such name, portrait or picture, or to any third party for sale or transfer directly or indirectly to such a user, for use in a manner lawful under this article; nothing contained in this article shall be so construed as to prevent any person, firm or corporation, practicing the profession of photography, from exhibiting in or about his or its establishment specimens of the work of such establishment, unless the same is continued by such person, firm or corporation after written notice objecting thereto has been given by the person portrayed; and nothing contained in this article shall be so construed as to prevent any person, firm or corporation from using the name, portrait or picture of any manufacturer or dealer in connection with the goods, wares and merchandise manufactured, produced or dealt in by him which he has sold or disposed of with such name, portrait or picture used in connection therewith; or from using the name, portrait or picture of any author, composer or artist in connection with his literary, musical or artistic productions which he has sold or disposed of with such name, portrait or picture used in connection therewith.

CHAPTER 36—CIGARETTE LABELING AND ADVERTISING

§ 1335. Unlawful advertisements on medium of electronic communication

After January 1, 1971, it shall be unlawful to advertise cigarettes and little cigars on any medium of electronic communication subject to the jurisdiction of the Federal Communications Commission.

§ 1338. Criminal penalty

Any person who violates the provisions of this chapter shall be guilty of a misdemeanor and shall on conviction thereof be subject to a fine of not more than $10,000.

No. 86-614

IN THE

Supreme Court of the United States

October Term, 1986

CHARLES C. WELCH,

Petitioner,

—against—

CARSON PRODUCTIONS GROUP, LTD.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

STEPHEN F. HUFF
Counsel of Record
PRYOR, CASHMAN, SHERMAN & FLYNN
JAMIE M. BRICKELL
On the Brief
Counsel for Respondent
410 Park Avenue
New York, New York 10022
(212) 421-4100

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Opinions Below

The opinion of the Second Circuit Court of Appeals dated May 16, 1986 was reported at 791 F.2d 13 (2d Cir. 1986) and is set forth in the Appendix of the Petition at pages A-1 through A-9. The decision of the United States District Court for the Southern District of New York dated August 30, 1985 is not officially reported and appears in the Appendix of the Petition at pages A-10 through A-14.

Jurisdiction

The jurisdictional requisites are adequately set forth in the Petition.

Questions Presented

1. Whether there are any Constitutional issues raised by the rulings of the District Court in this action.

2. Whether there is any basis for overturning the District Court's decision to exclude evidence concerning "illegality."

Statutory Provisions Involved

The pertinent provisions of the New York Civil Rights Law are set forth in the Appendix of the Petition at page A-32. The pertinent provisions of the Public Health Cigarette Smoking Act are set forth in the Appendix of the Petition at page A-33.

Counterstatement of the Case

Respondent Carson Productions Group, Ltd.[1] (hereinafter "Carson"), a television production company, sought to produce a program in 1982 entitled "Television's Greatest Commercials-Part II", a retrospective look at thirty years of television commercials. In order to obtain the right to utilize such commercials, Carson contacted the companies owning the rights thereto and entered into various agreements for such reuse. Thus, Carson obtained the rights to use all of the commercials ultimately shown on the program.

In addition, Carson contacted the Screen Actors Guild (hereinafter "SAG") in order to determine the manner in which it was required to compensate those actors who had appeared in the selected commercials. SAG advised Carson that it would have to comply with the terms of the 1977 SAG Television Agreement (hereinafter "the Green Book"), which provided

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[1]Respondent Carson Productions Group, Ltd. has no parent company, subsidiaries or affiliates within the meaning of Supreme Court Rule 28.1.

that a producer may not reuse television film of an actor in a manner other than that for which the actor originally was employed "without separately bargaining with the player and reaching an agreement regarding such use . . ." Green Book §36(a). More importantly, in addition to providing rates for paying actors for such reuse, the Green Book further provided that "[i]f the Producer is unable to find the player, it shall notify the Guild [SAG], and if the Guild is unable to find the player within a reasonable time, the Producer may use the photography . . . without penalty . . ." (§36(b)).

Consistent with such requirements, Carson attempted to identify the actors and actresses who had performed in the commercials it intended to use. The search proved unsuccessful in a number of cases, including the identification of Petitioner Charles C. Welch (hereinafter "Welch"), who had appeared for a total of five seconds in two commercials which Carson planned to use, one of which was a commercial for a cigarette called "Benson & Hedges." After Carson and SAG were both unable to identify Mr. Welch, Carson included the two commercials in which Mr. Welch appeared in the broadcast of the show in accordance with Section 36(b) of the Green Book.

After Mr. Welch contacted Respondent Carson and the two parties were unable to agree upon a figure to compensate him for reuse of his photographs, Petitioner Welch commenced an action against Carson seeking an injunction and damages in connection with a claimed violation of New York Civil Rights Law §51 based upon Carson's failure to obtain Mr. Welch's written permission to use his picture in such program.[2] As a

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[2]Petitioner Welch also named Jane L. Ltd., another production company, and Andreas Industries, Inc., the parent company of Jane L. Ltd., as defendants in this action based upon use of another commercial utilizing Mr. Welch's picture in a similar show. In a March 3, 1984 decision rendered by Judge Werker of the United States District Court for the Southern District, which decision is discussed below, the claims against these two defendants were dismissed as time-barred.

defense to such claims, Respondent Carson asserted, *inter alia,* that Mr. Welch's execution of an agreement with SAG whereby he agreed to abide by the by-laws of such Guild constituted the written permission required under the New York Civil Rights Law.

Both parties moved for summary judgment, *inter alia,* on the issue of written consent and, in an Order dated March 3, 1984, Judge Werker of the United States District Court for the Southern District of New York denied both motions. However, more significantly for these purposes, Judge Werker found as a matter of law in connection with the New York Civil Rights Law that "the use of plaintiff's [Petitioner's] picture was not for the purpose of advertising." Petitioner did not appeal this decision and was therefore bound by it.

Over the express written objection of Respondent Carson, Petitioner Welch made reference in the February 5, 1985 Joint Pre-trial Order submitted in this action, a copy of the relevant portion of which can be found in the Appendix of the Petition at pages A-21 and A-22, to the Public Health Cigarette Smoking Act of 1969 (hereinafter "the Act"), which provides, in pertinent part, that "it shall be unlawful to advertise cigarettes . . . on any medium of electronic communication subject to the jurisdiction of the Federal Communications Commission." Moreover, also over the express written objection of Respondent Carson, Petitioner Welch alleged in the aforesaid Joint Pretrial Order that the November 2, 1982 agreement between Respondent Carson and Phillip Morris, whereby Respondent obtained the right to utilize, *inter alia,* the "Benson & Hedges" commercial depicting Mr. Welch, a copy of which is located in the Appendix of the Petition at pages A-23 through A-25, was violative of the Act. Petitioner Welch, while alluding to the Act in his amended complaint, confined his causes of action against Respondent Carson to the aforesaid claimed violations of the New York Civil Rights Law.

At trial, Petitioner Welch sought to introduce evidence as to the Act and its supposed impact on the Carson/Phillip Morris agreement. The District Court (J. Kram) ordered that no such evidence would be permitted. After a trial on the merits, the District Court directed a verdict in favor of Respondent Carson, finding as a matter of law that Petitioner failed to establish a prima facie case inasmuch as permission to use the pictures in question was provided by SAG on Welch's behalf. The Second Circuit Court of Appeals unanimously affirmed the District Court decision and subsequently denied Welch's Petition for Rehearing and Suggestion for Rehearing En Banc.

Petitioner Welch submits the Petition for Writ of Certiorari in this matter, essentially claiming to have been improperly denied the opportunity to introduce evidence relating to the Act at trial. However, for a number of reasons set forth below, the decision to exclude such evidence was entirely proper and this Court should deny Welch's Petition.

ARGUMENT

I.

No Constitutional Issues Are Raised By The Decisions Of The District Court.

The Petition for Writ of Certiorari in this action sets forth five "questions presented" relating to the Act, several of which purportedly raise "Constitutional" issues in relation thereto. Specifically, Petitioner contends that his Constitutional right of Due Process "under the 7th Amendment" was violated by exclusion of evidence relating to the Act and by the direction of a verdict by the District Court in Respondent's favor. Petitioner also makes substantive reference within such Petition (at page 7 thereof) to the Seventh Amendment, accurately setting forth that such Constitutional Amendment pertains to one's right to

trial by jury. However, whether Petitioner is invoking the Fifth or the Seventh Amendment to the United States Constitution—and a careful reading of his Petition does not indicate which Amendment he is invoking—it is clear that no Constitutional questions are raised therein.

Specifically, the Seventh Amendment to the United States Constitution, which is set forth at page 7 of the Petition, relates to a person's right to trial by jury. The exclusion of particular evidence from a trial in no way prejudices a party's right to trial by jury, and Petitioner's reference to the "7th Amendment" in connection therewith is an absolute *non sequitur*. Moreover, a District Court is entirely within its right to take a case from the jury and direct a verdict pursuant to Fed. R. Civ. P. 50(a)—as the District Court did in the present case—when it finds as a matter of law that Petitioner has not made out its prima facie case. Petitioner has put forth no legal authority—and there certainly is no such authority—for his proposition that a District Court deprives a party of his Seventh Amendment rights merely by directing a verdict. As such, Petitioner's reference to the violation of right to trial by jury is unfounded.

Petitioner also makes reference, without specific citation, to a violation of his "due process" rights. Even assuming, *arguendo*, that Petitioner is referring thereby to the Fifth Amendment to the United States Constitution and his right to a "fair trial"—something which Petitioner never articulates or explains in his Petition—it is clear that no such violation of his rights took place. Mr. Welch commenced an action for violation of his rights pursuant to the New York Civil Rights Law and presented his case in connection therewith. After a complete trial, the District Court determined that Petitioner failed to make out a prima facie case under the Civil Rights Law, and properly directed a verdict. Again, Petitioner has offered no legal authority—and there is in fact no such authority—for his contention that his due process rights were violated because the

District Court excluded evidence on an unrelated matter which he improperly asserted to be relevant.[3] As such, none of Petitioner's Constitutional rights were violated in any way by the rulings of the District Court.

II.

The District Court Properly Excluded Evidence Concerning "Illegality".

Petitioner sought to introduce evidence at trial relating to the Act in order to somehow demonstrate that the agreement between Respondent Carson and Phillip Morris was in violation of the Act and, therefore, was null and void. In furtherance of such effort, Welch's Petition sets forth authority intending to further the convoluted proposition that since cigarette advertising on television is illegal, the broadcast of the "Benson & Hedges" commercial was therefore illegal and accordingly the license from Phillip Morris to Respondent was ineffective. The basic flaw in Petitioner's argument, however, is the total lack of illegality at any level—either in the license from Phillip Morris to Respondent or the inclusion of the commercial in the television program produced by Carson.

Even assuming, *arguendo*, that there is any substance to Petitioner's claim concerning illegality, however, the District Court nonetheless acted within its rightful power in excluding such evidence for several distinct reasons. First, as set forth above, Judge Werker's March 3, 1984 decision found that such commercial, as used in the context of the Respondent's show, was not utilized for purposes of advertising. Petitioner sought to in-

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[3]As will be discussed below, Petitioner brought no claims against Carson under the Public Health Cigarette Smoking Act, despite reference thereto in his amended complaint. In fact, there is no private cause of action thereunder. Stated simply, Welch has no standing to litigate the "case" which he seeks to argue before this Court.

troduce evidence at trial relating to the Act, which prohibited cigarette advertising. Under the doctrine of law of the case, the courts will refuse to reopen that which has already been decided. *Orshan* v. *Anker,* 550 F. Supp. 538 (E.D.N.Y. 1982); *Zdanok* v. *Glidden Company,* 327 F.2d 944 (2d Cir.), *cert. denied,* 377 U.S. 934, 84 S. Ct. 1338 (1964). Therefore, the District Court correctly refused to permit such evidence.

In addition, Petitioner's attempts to introduce evidence as to the illegality of broadcasting cigarette commercials were intended to give the jury the misleading and false impression that defendant had engaged in criminal activity in order to influence the jury's determination of damages. In excluding the testimony or any reference to illegality the court acted properly and within the scope of Rule 403, which explicitly provides that:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

As such, the Court's exclusion of such evidence was within its power pursuant to the Federal Rules.

Equally compelling, contrary to all of Petitioner's assertions concerning the Act, a private individual has no standing to assert a claim pursuant to the Public Health Cigarette Smoking Act of 1969. Thus, despite his invocation of questions concerning "national public health interests", while the appropriate law enforcement authorities may enforce the laws concerning advertising on television, Mr. Welch may not.

Finally, even if an individual had standing to assert a claim pursuant to the Act, the simple fact is that Mr. Welch asserted no such claim. The amended complaint in this action, portions of which are found in the Appendix of the Petition at pages

A-15 through A-18, while it *mentions* the Act, asserts no causes of action against Respondent thereunder. Under these circumstances, it is clear that the District Court acted in an entirely proper manner by excluding such evidence and there is therefore no "taint" on its decision to direct a verdict in Respondent's favor, as Petitioner would have this Court believe.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

STEPHEN F. HUFF
Counsel of Record
PRYOR, CASHMAN, SHERMAN & FLYNN
JAMIE M. BRICKELL
On the Brief
Counsel for Respondent
410 Park Avenue
New York, New York 10022
(212) 421-4100

No. 86-614

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

CHARLES C. WELCH,

Petitioner,

—against—

CARSON PRODUCTIONS GROUP, LTD.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JAMES P. COSTELLO
Attorney for Petitioner
20 Vesey Street
New York, New York 10007
(212) 349-1167

Of Counsel:
PETER CAMPBELL BROWN
JOHN W. TILLEY

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

No. 86-614

CHARLES C. WELCH,

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PETITIONER'S REPLY BRIEF TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Preliminary Statement

In accordance with the Rules of the Supreme Court petitioner respectfully interposes this Reply to the items and arguments put forward by the respondent in opposition to this Court's granting of a Writ of Certiorari herein.

The Facts of the Petition and Appendix

Fortunately for the interests of brevity herein, most of the material for this reply and rebuttal is already contained in the items and excerpts set forth in the Appendix to the Petition, the correctness of which has not been denied by respondent.

Plaintiff accordingly submits, in summary, the following facts as pertinent to this Reply:

- that the unlawful agreement made by Carson with Philip Morris Inc is spelled out in paragraphs "6", "7" and "8" of the complaint (cf pages A-17 et seq of the Appendix), and
- that such issue of illegality of the Philip Morris contract/license and of any third-party consent, as from SAG, is spelled out in the Joint Pre-Trial Order (cf pgs A-21 and A-22 of said Appendix), and
- that because of the district court's rule of silence imposed regarding the illegality of cigarette commercials (cf A-26) and said court's prohibiting any mention of the Public Health Cigarette Smoking Act in counsel's opening to the jury and throughout the trial, none of the facts and circumstances of illegality regarding the inception, execution and performance of said illegal contract, agreements or consents could be developed at trial.

Now, at this point, petitioner respectfully submits to this Court that it is basic to our law of due process that a litigant has the constitutional right to

plead and prove, i.e., to raise, as many defenses as are available to him.

Such basic right contained in the 5th Amendment is stated in 16A American Jurisprudence 2d, 1048, Constitutional Law, Section 843:

> "Right to Raise Issues and Defenses:
>
> "Due process requires that a party sought to be affected by a proceeding shall have the right to raise such issues or set up any defense which he may have in the cause.
>
> "The right to be heard must necessarily embody a right to file motions and pleadings essential to present claims and raise relevant issues ... the fundamental law of the land secures to him the right to be heard in his own defense.
>
> "A hearing which does not give the right to interpose reasonable and legitimate defenses cannot constitute due process of law."

Also petitioner's right to show illegality of contract is stated in 30 American Jurisprudence 2d, Section 1035, as follows:

> "Thus, parol evidence is admissible to show that a contract valid on its face is a mere cover for an illegal transaction ... or that a contract was otherwise illegal at its inception.
>
> "Facts showing illegality may be proved, whether such illegality arises from the furtherance of objects forbidden by statute, or common law, or by the general policy of the law."

The Joint Pre-Trial Order statement of illegality is clearly stated on Appendix Page A-21 as follows:

> "(2) That perforce of said Public Health Cigarette Smoking Act of 1969 that any consent or licensing or contract that provides or arranges advertisements of cigarettes on any medium of electronic communication is illegal and void."

Accordingly, it is clear from the undisputed facts of this case that petitioner had the constitutional right to be heard at trial on such issue in his opening statement and to offer his proof of illegality under Section 1335 of the Public Health Cigarette Smoking Act as to both the Philip Morris and the Screen Actors Guild agreements that were required to be obtained by Carson in order to use the Benson & Hedges cigarette commercial in its production entitled "Television's Greatest Commercials."

REPLY TO RESPONDENT'S OPPOSITION

At the outset, it should be noted that respondent's opposition brief has not addressed in any specific manner the five enumerated Questions Presented nor has respondent denied the absolute defense of the law of illegality of contract as expressed by this Court in Oscanyan v Arms Co, 103 U.S. 268.

It is clear, therefore, that respondent has not presumed to deny that there is such a thing in the civil law as the affirmative defense of illegality and that, once such a defense is proven, the party's (here, Carson's) case is contaminated.

In the further words of Oscanyan:

> "Where the contamination reaches (here the collective bargaining agreement with Screen Actors Guild) it destroys."

The law of illegality in the State of New York further provides that such statutory illegality of agreement applies even though only one party's action (here Carson and Philip Morris) would be in violation of the statute but not the other (here Screen Actor's Guild). See Estate of Sanchez, 481 NYS 2d 601, 604, where it was stated:

> "... It has long been settled law that a contract made in violation of either a constitution or statute is an unlawful undertaking and, as such, is void and unenforceable." (citing, among others, the Kaiser-Fraser case).
>
> "... It has been held that non-enforceability of a contract made in violation of a statute results even though only one party's action would be in violation of the statute. (citing)..."

Also, the respondent's attempt to convey the impression that the Screen Actor's Guild was opposed to Mr. Welch's suit against Carson is not true - the Record belies it.

This was evidenced at trial by the letter of Screen Actor's Guild (cf copy on page RA-1) showing that Mr. Welch was told by Screen Actor's Guild prior to this suit that he was free under a landmark New York case to pursue his rights against Carson in Court under the Civil Rights Law of the State of New York.

The Screen Actors Guild officer who wrote that letter was subpoened to trial by petitioner and testified (without contest or cross-examination by respondent) as follows:

"Q - Insofar as the Screen Actors Guild was concerned he (petitioner) had a right to proceed on his own, is that correct?

"A - Correct."

MR. COSTELLO: That's all.

MR. HUFF: No questions."

Also, the business representative of Screen Actors Guild testified that Carson never informed her and kept her in the dark about the Public Health Cigarette Smoking Act in his license with Philip Morris (cf excerpts from testimony attached hereto on pages RA-2 and RA-3).

Further to this Reply, respondent's red herring reference to the late Judge Werker's use of the word "advertising" has nothing to do with the questions before

this court. Illegality was never rendered res judicata in the lower court. If it were, petitioner's enumerated affirmative defense of illegality would not have been permitted to be included in the Joint Pre-Trial Order herein (A-21). Further, respondent's allusion to evidentary Rule 403 is fallacious inasmuch as proof of illegality of contract necessarily involves a violation of the law and cannot be proven otherwise.

Petitioner submits that respondent has not denied that the circuit court of appeals panel followed the district court's decision, and, accordingly, sub silentio, has affirmed the lower court's directed verdict without any consideration of illegality of contract or the Public Health Cigarette Smoking Act.

At this juncture therefore petitioner respectfully submits (1) that the district court's treatment of this case with respect to the non-trial of the issue of illegality and the Public Health Cigarette Smoking Act was not a mere evidentiary error but was a very very substantial departure from accepted judicial trial proceedings and (2) that the appeals court panel's sanction, sub silentio, of such departure therefore renders appropriate the Court's application of Supreme Court Rule 17,1.(a) to this case.

Suggestion as to Rule 17,1.(a) Consideration

In a single-sentence synopsis, this case of illegality of Carson's use of TV cigarette advertising (commercials) was placed squarely at issue at trial and petitioner's right to be heard and to adduce proof thereof was completely denied to him, and, on appeal, such extraordinary departure from accepted judicial proceedings at trial was sanctioned, sub silentio, by the appeals panel as is reflected in its published decision which also totally ignored the issue of illegality and federal legislation, namely Section 1335 of the Public Health Cigarette Smoking Act that was enacted in the public interest to prevent such cigarette advertising from being carried to the country on public TV channels.

Accordingly, petitioner respectfully submits that in addition to the reasons given in the Petition for the granting of the Writ sought herein this Court may also consider the far-out departure from the course of accepted judicial proceedings at trial herein that was sanctioned sub silentio by the appeals court to be such as to call for this Court's power of supervision pursuant to Rule 17,1.(a) of the Rules of the Supreme Court.

Recapitulation, Summary and Conclusion:

The respondent's arguments are not pertinent or relevant to the Questions Presented to this Court.

Nor has respondent addressed the matter of non-trial of petitioner's affirmative defense of illegality, or the lower courts' failure to apply the Public Health Cigarette Smoking Act to either the Philip Morris or the Screen Actors Guild agreements which were necessary in the first instance to be gotten by Carson in order for him to rerun commercials containing petitioner's picture.

As to this petitioner further respectfully submits that since the agreements Carson made with Philip Morris, whereby he was supplied with the Benson & Hedges copyrighted TV materials, and the Screen Actors Guild collective bargaining agreement, whereby he allegedly obtained the necessary written consent of petitioner, were both required before Carson could have a "right" to use these commercials in his production "Television's Greatest Commercials", they are both prima facie violative of Section 1335 of the Public Health Cigarette Smoking Act and are therefore illegal, null and void and, as such, are of no binding effect whatsoever on petitioner.

Lastly, plaintiff most respectfully submits

that the aforedescribed denial to petitioner of the right to be heard and to prove this absolute defense of illegality, together with the concomitant important public health interest involved in keeping the airways free of lethal cigarette advertisements and (1) in stopping such indirect TV cigarette advertising and (2) in making an example of such reckless disregard and subversion of the U.S. Public Health Cigarette Smoking Act, amply warrants this Court's granting the Writ of Certiorari prayed for herein and, ultimately, in ordering the remand of this case for a trial on the merits of such issue of illegality.

Respectfully submitted,

JAMES P. COSTELLO
Attorney for Petitioner
20 Vesey Street
New York, N. Y., 10007
Tel. (212) 349-1167

Of Counsel:
PETER CAMPBELL BROWN
JOHN W. TILLEY

PETITIONER'S APPENDIX TO REPLY BRIEF

RA-1

SCREEN ACTORS GUILD

January 3, 1983

Mr. Charles C. Welch
610 West End Avenue
Apartment #PH-C
New York, New York 10024

Re: Carson Productions
"TV's Greatest Commercials,Part II"

Dear Charlie:

I am in receipt of the release form sent you by Carson Productions for the use of two commercials in which you appeared.

While the form is primarily general in nature, the last sentence of the second paragraph does refer to the applicability of the Screen Actors Guild Television Contract to which this producer is signatory.

However, as you are well aware, you may reject any part or all of this offer and you may proceed on your own. We are all quite familiar with Welch v. Mr. Christmas Inc. and we, too, consider it a landmark in the protection of Actors' rights.

Should you wish the Guild to pursue your claim for minimum, Mr. Roberts and Ms. Krone in the Screen Actors Guild Hollywood office are the persons to contact.

Sincerely,

Elinor London
Assistant Executive Secretary
EL:jw
cc: Jack Roberts)
Kat Krone) SAG Hollywood

EXCERPTS OF TESTIMONY OF SCREEN ACTORS GUILD BUSINESS REPRESENTATIVE, KAT KRONE:

During cross-examination the Hollywood Screen Actors Guild witness Kat Krone freely admitted that the question of the illegality of the use of these cigarette commercials was not the subject of any discussion nor had she ever beforehand seen or been shown a copy of the controversial Philip Morris cigarette licensing contract Carson had with that company:

"Q - Were you fully informed by Carson Productions as to their contract, for example, with NBC Entertainment, did you know the terms and conditions of that?

"A - It was never discussed.

"Q - Did you know the terms and conditions of the license that they received from Philip Morris to use the commercial "Disadvantages"?

"A - No.

"Q - You were not shown any of that by Carson, were you?

"A - You are talking about their licensing?

"Q - Yes. From Philip Morris.

"A - No."

This SAG business representative had therefore admitted she had never even seen or examined the license of Philip Morris or the Public Health Cigarette Smoking

Act of 1969.

So it is apparent from the Record that the Screen Actors Guild never took into consideration that there was an important public health statute involved when it gave its alleged consent for the reuse of this cigarette commercial (A-526):

> "Q - Did you ever see this exhibit (the Benson & Hedges Cigarette Commercial license), Plaintiff's Exhibit 16 in evidence?
>
> "A - No."

The issue of illegality of the Philip Morris license/ contract cannot therefore be said to have ever been within the comprehension of the SAG Hollywood representative when she made the alleged collective bargaining agreement with Carson Productions.

What is the only conclusion?

That her consent was based on a mere presumption of legality that was nowhere established by Carson Productions in the Record of this case.